1988

The State of Utah v. Steven J. Pyeatt : Brief of Appellant

Utah Court of Appeals

Brooke C. Wells; Joan C. Watt; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.
David L. Wilkinson; Attorney General; Attorney for Respondent.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
STEVEN J. PYEATT,	:	Case No. 880274-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance with Intent to Distribute, a second degree felony, in violation of Utah Code Ann. §58-37-8(1)(a)(ii) (Supp. 1988), Unlawful Possession of a Controlled Substance, to wit: Marijuana, a Class B misdemeanor, in violation of Utah Code Ann. §58-37-8(2)(a)(i) (Supp. 1988), and Unlawful Possession of Paraphernalia, a Class B misdemeanor, in violation of Utah Code Ann. §58-37a-5(1) (1986), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

BROOKE C. WELLS
JOAN C. WATT
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South
Salt Lake City, Utah 84111

Attorneys for Appellant

DAVID L. WILKINSON
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
STEVEN J. PYEATT,	:	Case No. 880274-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance with Intent to Distribute, a second degree felony, in violation of Utah Code Ann. §58-37-8(1)(a)(ii) (Supp. 1988), Unlawful Possession of a Controlled Substance, to wit: Marijuana, a Class B misdemeanor, in violation of Utah Code Ann. §58-37-8(2)(a)(i) (Supp. 1988), and Unlawful Possession of Paraphernalia, a Class B misdemeanor, in violation of Utah Code Ann. §58-37a-5(1) (1986), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

BROOKE C. WELLS
JOAN C. WATT
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South
Salt Lake City, Utah 84111

Attorneys for Appellant

DAVID L. WILKINSON
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.	ii
TEXT OF CONSTITUTIONAL PROVISIONS	iv
STATEMENT OF THE ISSUES	v
JURISDICTIONAL STATEMENT.	vi
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS.	1
SUMMARY OF THE ARGUMENT	6
ARGUMENT	
POINT I. THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE INVALID UNDER THE FEDERAL CONSTITUTION.	7
A. THE AFFIDAVIT WAS FACIALLY DEFICIENT IN THAT IT FAILED TO STATE SUFFICIENT FACTS FOR A DETERMINATION OF PROBABLE CAUSE.	8
B. MATERIAL MISREPRESENTATIONS AND OMISSIONS IN THE AFFIDAVIT INVALIDATED THE SEARCH WARRANT.	17
POINT II. THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE INVALID UNDER THE UTAH CONSTITUTION.	31
POINT III. THE SEARCH WARRANT VIOLATES STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR PARTICULARITY.	37
CONCLUSION.	38

TABLE OF AUTHORITIES

PAGE

CASES CITED

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) 9, 10

Allen v. Holbrook, 135 P.2d 242 (Utah 1943), modified on reh'g and pet. denied, 139 P.2d 233 (Utah 1943) 38

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) 16, 17, 18, 19, 20, 23, 28, 33

Illinos v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), reh'g denied, 463 U.S. 1237 (1983) 8

Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) 15, 16

Moreau v. State, 588 P.2d 275 (Alaska 1978). 34

People v. Cook, 583 P.2d 130 (Cal. 1978) 34, 36

People v. Kurland, 618 P.2d 213 (Cal. 1980), cert. denied, 451 U.S. 987 (1981) 21, 22, 29

People v. Theodor, 501 P.2d 234 (Cal. 1972) (modified on denial of reh'g) 36

People v. Winden, 689 P.2d 578 (Colo. 1984). 21, 29

Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) 9, 10

State v. Anderson, 701 P.2d 1099 (Utah 1985) 9

State v. Anderton, 668 P.2d 1258 (Utah 1983) 9, 10

State v. Bailey, 675 P.2d 1203 (Utah 1984) 9, 10

State v. Caldwell, 384 So.2d 431 (La. 1980). 34

State v. Earl, 716 P.2d 803 (Utah 1986). 31

State v. Gallegos, 712 P.2d 207 (Utah 1985). 8

State v. Hygh, 711 P.2d 264 (Utah 1985). 31

PAGE

State v. Kittredge, 585 P.2d 423 (Or. Ct. App. 1978) . . . 14, 15

State v. Lafferty, 749 P.2d 1239 (Utah 1988) 31

State v. Larocco, 742 P.2d 89 (Utah App. 1987) (pet. cert. granted). 31

State v. McGee, 607 P.2d 217 (Or. Ct. App. 1980) 14

State v. McManus, 243 N.W.2d 575 (Iowa 1976) 12

State v. Malkin, 722 P.2d 943 (Alaska 1986). 34

State v. Miller, 740 P.2d 1363 (Utah App. 1987). 20

State v. Nielsen, 727 P.2d 188 (Utah 1986) 19, 20, 21, 23, 28, 32, 35

State v. Romero, 660 P.2d 715 (Utah 1983). 8

State v. Slowe, 728 P.2d 110 (Utah 1985) reh'g denied (1986) 18, 19

State v. Watts, 750 P.2d 1219 (Utah 1988). 32

State v. Witwer, 642 P.2d 828 (Alaska Ct. App. 1982) . . . 13

United States v. Hunt, 496 F.2d 888 (5th Cir. 1974). . . . 34

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), reh'g denied, 468 U.S. 1250 (1984). 15, 16, 17

United States v. Thomas, 489 F.2d 664 (5th Cir. 1974) 34

STATUTORY AND CONSTITUTIONAL PROVISIONS

Article I, Section 14, Utah Constitution 7, 31, 32, 33, 35, 36, 37

Fourth Amendment, United States Constitution 6, 8, 20, 28, 32, 33, 37

Utah Code Ann. §77-35-3(1) (1953 as amended) 37

TEXT OF CONSTITUTIONAL PROVISIONS

The fourth amendment to the federal constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14 of the Utah Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

STATEMENT OF THE ISSUES

1. Are the search warrant and supporting affidavit invalid under the fourth amendment to the federal constitution?

   a. Is the affidavit facially deficient in that it failed to state sufficient facts for a determination of probable cause?

   b. Did the material misstatements and omissions invalidate the search warrant?

2. Are the search warrant and supporting affidavit invalid under the Utah Constitution?

3. Does the search warrant violate statutory and constitutional requirements for particularity?

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §77-35-26(2)(a) (Supp. 1988) and Utah Code Ann. §78-2a-3(2)(f) (Supp. 1988) whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment of conviction for any crime other than a first degree or capital felony. In this case, the Honorable Kenneth Rigtrup, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah, rendered final judgment and conviction against Mr. Pyeatt for Unlawful Possession of a Controlled Substance, a second degree felony; Unlawful Possession of a Controlled Substance, to wit: Marijuana, a Class B. misdemeanor; and Unlawful Possession of Paraphernalia, a Class B misdemeanor.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
STEVEN J. PYEATT,	:	Case No. 880274-CA Priority No. 2
Defendant/Appellant.	:	

STATEMENT OF THE CASE

This is an appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance with Intent to Distribute, a second degree felony, in violation of Utah Code Ann. §58-37-8(1)(a)(ii) (Supp. 1988), Unlawful Possession of a Controlled Substance, to wit: Marijuana, a Class B misdemeanor, in violation of Utah Code Ann. §58-37-8(2)(a)(i) (Supp. 1988), and Unlawful Possession of Paraphernalia, a Class B misdemeanor, in violation of Utah Code Ann. §58-37a-5(1) (1986). After denying the defendant's Motion to Suppress Evidence (R. 79), the judge found Mr. Pyeatt guilty at a bench trial held on February 8, 1988 (R. 81).

This appeal arises out of the denial of the Motion to Suppress Evidence and subsequent convictions and judgment rendered by the Honorable Kenneth Rigtrup, Judge, Third District Court, Salt Lake County, State of Utah.

STATEMENT OF THE FACTS

On March 10, 1987, Judge Sheila McCleve issued a search warrant for the premises known as 533 South Montgomery, 1575 West,

Salt Lake City, Utah (Addendum A). The search warrant authorized a search for "[c]ocaine, a white powdery substance, cutting agents, packaging and scales." Id. at 1.

In the second paragraph of the affidavit in support of the search warrant, Deputy Michael Droubay, the affiant, stated that within the past ten days, between February 24 and March 5, 1987, he used a confidential informant ("C.I.") to make two "controlled" buys at 533 South Montgomery (Addendum B at 2). At the hearing on the motion to suppress, Deputy Droubay acknowledged that this statement was false since the C.I. had never been inside the premises at 533 Montgomery as far as Deputy Droubay knew (Transcript of Evidentiary Hearing held September 17, 1987, hereinafter "T" at 19, 20).

The affidavit later stated that on two separate occasions, the affiant and assisting detectives searched the C.I., then gave him money and instructions to purchase certain amounts of cocaine. The C.I. then entered the Atherton apartment (Addendum B, 2-3).

According to the affidavit, shortly after the C.I. entered the Atherton apartment, officers observed a man "known as Randy" leave the apartment and drive to the Montgomery address. Id. at 2. The affidavit pointed out:

> Your affiant received information, at that time, from the C.I. as he entered the apartment, he was greeted by the suspect, known to us as RANDY. He handed the currency to RANDY, and RANDY then left the apartment for parts unknown to purchase the cocaine.

Id. at 3 (emphasis added).

According to the affidavit, the "suspect," known as Randy, on each of the two occasions drove to 533 Montgomery. Travel time each way took twelve to sixteen minutes; the "suspect" stayed at the Montgomery house twenty-two minutes on the first occasion and eight minutes on the second (Id. at 2-4).

According to the affidavit, on the first occasion, the

> C.I. stated that at the time affiant was aware that RANDY was at the Montgomery address, C.I. received, at the Atherton address, a phone call from RANDY saying the "stuff" is on a scale and that RANDY would be back.

Id. at 3 (emphasis added).

Although the affidavit pointed out that the C.I. gave "Randy" money to secure drugs and Randy subsequently left the Atherton apartment and drove to the Montgomery location, Deputy Droubay testified that there were actually two people other than the C.I. in the Atherton apartment, and an individual other than Randy left both times (T. 13). Droubay testified:

> A. His first name was Brad. . . .
> He was identified by first name to us by the C.I. at the time of the first controlled buy. We knew who was going to be doing the driving; we knew who we had to follow.

(T. 16).

Hence, the affidavit was inaccurate in stating that Randy took the money and then drove to the Montgomery address.

The affiant further stated that he considered the C.I. to be reliable because:

> Your affiant and assisting Detectives, having had C.I. purchase cocaine on at least eight separate occasions, and each representation made

> was born out by producing either cocaine or marijuana. The C.I. has also purchased marijuana and cocaine on several occasions for your affiant and assisting Detectives.

Id. at 4.

The affiant stated he verified the information from the C.I. in the following manner:

> Your affiant has used information given to him by the C.I. to make arrests of your narcotic dealers, said to obtain other search warrants. The previous search warrants obtained by your affiant and other Narcotic Detectives using information, and controlled buys from the C.I. have all been confirmed by producing controlled substance, as a result of the authorized searches, including narcotics packaging, and resulting in arrests of persons for violation on those premises.

Id.

Deputy Droubay stated that he considered the C.I. reliable because he and assisting detectives had the C.I. purchase cocaine on prior occasions. However, Detective Droubay failed to include information in the affidavit that the C.I. was not an officer and had previously been arrested for Distribution of a Controlled Substance (T. 35). The judge was also not informed that officers were dropping four additional counts of Distribution of a Controlled Substance against the C.I. in exchange for his undercover work (T. 40).

Mr. Droubay also failed to inform the judge that during half an hour to an hour, "the suspect known as Randy" was in transit or at the Montgomery residence on each of the two occasions, no officers were watching the Atherton apartment which the C.I. had entered to make the "controlled" buys and that the C.I. was

therefore unobserved during that period (T. 65). At the hearing, Mr. Droubay attempted to cover this lapse by testifying:

> Defense Counsel: Now, when you left the Atherton address, who did you leave to watch the Atherton apartment to make sure no one entered or left?
>
> Droubay: I believe it was Deputy Vaun Delahunty.
>
> **Q:** Who?
>
> **A:** I believe it was Deputy Vaun Delahunty. I'm not really sure on that, however.
>
> Q: Would you look at your records to see if it indicates in any place that any officer remained at the Atherton address?
>
> **A:** I have looked at my report, and it does not indicate. And, again, I'm not sure if Vaughn (sic) was there or not.
>
> **Q:** If Officer Delahunty was not there, then no--
>
> **A:** Then noone was.
>
> **Q:** --one would be there?
>
> **A:** Then noone was there.

(T. 38-39). The three other officers involved testified that noone remained at the Atherton residence (T. 72, 84). Officer Rigby testified further that had it been his case, he would have left an officer to observe the Atherton residence so that he would not have had to rely completely on the C.I. (T. 80) and that other people residing at the Atherton location were under suspicion (T. 80).

The affidavit also did not inform the judge that the C.I. had had no dealings with the occupants of 533 Montgomery and had never been there (T. 19, 20) and that persons other than "Randy" frequented or lived at the Atherton apartment.

Defense counsel moved to suppress the evidence seized on March 10, 1987, pursuant to the search warrant (R. 17). An evidentiary hearing was held on September 17, 1987 (R. 24). Thereafter, counsel submitted memoranda (R. 49-78) and the matter was orally argued on January 27, 1988 (R. 79). The trial judge denied the motion to suppress (R. 79).

On February 8, 1988, the matter was submitted to the judge for decision based on the evidence introduced in the motion to suppress hearing plus additional stipulated facts (Trial Transcript hereinafter "TT" at 6). Defense counsel renewed her motion to suppress at trial and the trial judge again denied such motion (TT. 6).

The Court found Mr. Pyeatt guilty of Unlawful Possession of a Controlled Substance with Intent to Distribute, a second degree felony; Unlawful Possession of a Controlled Substance, to wit: Marijuana, a Class B misdemeanor; and Unlawful Possession of Paraphernalia, a Class B misdemeanor (TT. 12).

SUMMARY OF THE ARGUMENT

The search warrant and supporting affidavit were invalid under the fourth amendment to the United States Constitution. First, the affidavit on its face failed to state sufficient facts to establish the existence of probable cause to search the house at 533 Montgomery Avenue. Second, even if the affidavit were facially sufficient, the affiant intentionally or recklessly included material misrepresentations and omitted material information. After

the material misrepresentations are excised and the material omissions inserted, the accurate facts fail to establish probable cause to search the Montgomery Avenue home.

The search warrant and supporting affidavit are invalid under article I, section 14 of the Utah Constitution. This Court should interpret the Utah Constitution to invalidate any search warrant and the entire supporting affidavit where an affiant officer intentionally or recklessly misrepresents the facts or omits material information from the affidavit. This Court should also interpret the Utah Constitution to permit the excision of negligent misrepresentations in an affidavit.

The search warrant was invalid pursuant to constitutional and statutory requirements that it describe with particularity the items to be seized.

ARGUMENT

POINT I

THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE INVALID UNDER THE FEDERAL CONSTITUTION.

In the motion to suppress, defense counsel challenged the validity of the search warrant under both the federal and state constitutions based on the facial lack of probable cause in the affidavit, the affiant's intentional or reckless misrepresentations in and omissions from the affidavit, and the lack of particularity (R. 17, 26-41, Transcript of hearing held January 7, 1988,

hereinafter "TH" at 6-13). The Court denied the motion to suppress (TH 27-8). (For entire transcript of judge's ruling, see Addendum C.)

A review of the affidavit in support of the search warrant and testimony of the officers establishes that the decision of the trial court to deny the motion to suppress was erroneous. See State v. Gallegos, 712 P.2d 207, 208-9 (Utah 1985). Hence, despite the "great deference [given] to a magistrate's determination of probable cause," the trial court's denial of the motion to suppress should be reversed on appeal. State v. Romero, 660 P.2d 715, 719 (Utah 1983); see also Gallegos, 712 P.2d at 208-9. ("[T]his Court will not disturb the ruling of the trial court on questions of admissibility of evidence unless it appears that the lower court was in error.").

A. THE AFFIDAVIT WAS FACIALLY DEFICIENT IN THAT IT FAILED TO STATE SUFFICIENT FACTS FOR A DETERMINATION OF PROBABLE CAUSE.

The fourth amendment to the United States Constitution, applicable to state criminal cases through the fourteenth amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), reh'g denied, 463 U.S. 1237 (1983), the United States Supreme Court abandoned the two-pronged Aguilar-Spinelli

test[1] followed previously when evaluating an affidavit which relied on an informant's tip, and embraced the broader "totality of the circumstances" test.

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

462 U.S. at 238-9 (quotations omitted).

The Utah Supreme Court has followed the United States Supreme Court in applying the more general "totality of the circumstances" test (see State v. Anderton, 668 P.2d 1258 (Utah 1983); State v. Anderson, 701 P.2d 1099 (Utah 1985)), requiring that there be a fair probability that the evidence exists and can be found where the informant says it is located. See State v. Anderson; State v. Bailey, 675 P.2d 1203 (Utah 1984).

In the instant case, the affidavit failed to establish that cocaine was ever inside the premises at 533 Montgomery Avenue. While the facts set forth in the affidavit may have raised a suspicion that the cocaine obtained by the C.I. came from the Montgomery house, they did not amount to probable cause so as to allow a constitutionally permissible search.

---

[1] The test evolved from the cases of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The two prongs were (1) the affidavit was required to establish the basis of the informant's knowledge and (2) the affidavit must establish the informant's veracity or reliability.

In many cases where the Utah Supreme Court has upheld a search warrant, an officer or confidential informant has actually seen the contraband inside the house. In State v. Anderton, the confidential informant observed marijuana inside the premises and relayed that information to the affiant, and in State v. Bailey, the confidential informant saw the stolen goods inside the premises and heard the defendant say he had burglarized an automotive shop.

By contrast, in the instant case, the affidavit contains no assertion that anyone saw cocaine inside the premises at Montgomery Avenue. While the affidavit did contain a paragraph which stated:

> C.I. stated that at the time affiant was aware that RANDY was at the Montgomery address, C.I. received, at the Atherton address, a phone call from RANDY saying the "stuff" is on the scale and that RANDY would be back.

that statement does not say that cocaine was being kept in the Montgomery house. Furthermore, the statement depends not only on the veracity and reliability of the C.I., but also on the reliability of "RANDY," who was an unknown in the operation and the primary suspect (T. 9-10). Because of the lack of verification and the general nature of the statement, the alleged statement by "Randy" fails to establish a fair probability that cocaine was in the Montgomery house at the time of the first buy.

In addition, the affidavit failed to establish the reliability of the C.I. or any other participant. Although the formal two-pronged Aguilar-Spinelli test is no longer followed, compliance with that test is still a relevant consideration under

the broader totality of the circumstances test. Anderson, 701 P.2d at 1101.

In this case, the affidavit stated:

> Your affiant and assisting Detectives, have had the C.I. purchase cocaine on at least eight separate occasions, and each representation made was born out by producing either cocaine or marijuana. The C.I. has also purchased marijuana and cocaine on several occasions for your affiant and assisting Detectives.

It is unclear from this paragraph whether the officer was directly involved in the purchases or was informed of them by other officers. Nor is it clear the type or number of representations made by the C.I. which resulted in the purchase of drugs. The only piece of usable information in this paragraph is that on eight separate occasions, the C.I. was able to produce illicit drugs.

The affidavit also stated:

> Your affiant has used information given to him by the C.I. to make arrests of your narcotic dealers, said to obtain other search warrants. The previous search warrants obtained by your affiant and other Narcotic Detectives using information, and controlled buys from the C.I. have all been confirmed by producing controlled substances, as a result of the authorized searches, including narcotics packaging, and resulting in arrests of persons for violation on those premises.

The number of search warrants obtained based on the C.I.'s information and whether Droubay or another officer obtained them is not clear. While the searches incident to such search warrants produced drugs and packaging and led to the arrest of persons on the premises, the affidavit does not clarify whether specific information given by the C.I. led to those arrests or whether the

arrests resulted in convictions. As worded, the affidavit leaves some question as to the basis of the officer's belief that the C.I. was reliable.

Furthermore, other than the "coincidence in timing" of the two visits to the Montgomery house by a person who had been present in the Atherton house, nothing in the affidavit indicated that cocaine sold to the C.I. came from the Pyeatt house, and not from the car or the Atherton house or some other source.

In State v. McManus, 243 N.W.2d 575 (Iowa 1976), the Iowa Supreme Court suppressed evidence seized pursuant to a search warrant where the affidavit stated that a third person met with an officer to sell him marijuana, then drove to a farmhouse and returned with the substance. The Court pointed out:

> Our problem with the facts of this case is that there was nothing beyond the mere coincidence of timing of the visit of Goodrich to the McManus farmhouse to connect defendant with any wrongdoing. There was no indication from the affidavit for the search warrant or the abstract of the oral testimony that Goodrich's auto did not already contain the marijuana before his visit to the farmhouse, that Goodrich took anything from the farmhouse to his car while there or that he even opened the trunk of the vehicle at any time he was at the farm. There was no indication of any independent information linking defendant to wrongdoing, of which the events of November 1 might have been corroborative. There was no indication that Goodrich or anyone else provided information tending to incriminate defendant. Defendant himself was apparently not observed on November 1; the information for the search warrant indicated the affiant did not know who occupied the house near Lone Tree. There was no indication of any other suspicious visits to defendant's home.

Id. at 578.

In State v. Witwer, 642 P.2d 828 (Alaska App. 1982), the Court upheld a search warrant where the affidavit was prepared after following a person engaged in the sale of cocaine to the premises on two separate occasions. The officers prepared the affidavit in anticipation that the seller would return to the premises a third time prior to consummating another sale and with the stipulation that the search warrant would be executed only if the seller went to the premises during a third transaction. The Witwer court emphasized the importance of that third transaction for reaching a conclusion that the detour to the premises must be related to the transaction and not merely coincidental.

In the present case, the affidavit did not contain information that the officers saw "Randy" carrying anything as he left the Montgomery house on either of the two occasions. Nor did the affidavit contain information that Mr. Pyeatt sold the cocaine to anyone or that incriminated Mr. Pyeatt in any way. Officers did not even know who lived in the premises at 533 Montgomery when they requested the search warrant.

Under the totality of the circumstances of this case, the affidavit failed to present sufficient facts that there was a "fair probability" that cocaine had been inside the premises at the Montgomery address at the time that the C.I. made the two "controlled" buys.

Nor did the affidavit present sufficient facts to establish that even if cocaine had been sold at the Montgomery address, cocaine would be found there at the time the warrant was

executed. The affidavit asserted that "[w]ithin the past ten days, between the period of February 24th and March 5th, 1987," the affiant had executed two controlled buys using the C.I. The search warrant was not signed by the magistrate until March 10, 1987, at least five days after the last controlled buy and as much as sixteen days after the first buy.

In State v. Kittredge, 585 P.2d 423 (Or. Ct. App. 1978), the Court held an affidavit stating that a C.I. was inside certain premises within the past ninety-six hours and had seen marijuana while inside was not sufficient for a finding of probable cause. The Court determined that the "peculiar facts set out in the affidavit were 'stale'" (Id. at 424) and that the affidavit lacked sufficient showing that the marijuana would still be present. The Court pointed out that several facts were not made known in the affidavit including (1) the quantity of marijuana seen inside the premises, (2) in whose possession the marijuana was seen or (3) the prior history of the suspects which might suggest marijuana would still be on the premises. Id. at 424-5.

Similarly in State v. McGee, 607 P.2d 217 (Or. Ct. App. 1980), the Court invalidated a search warrant where the affidavit stated that a C.I. had seen marijuana in the defendant's house during the past forty-eight hours. The Court referred to Kittredge, stating:

> We observed that the affidavit did not relate how much marijuana was seen in the house, who normally occupied the house, who actually possessed the marijuana, or whether the suspect had a history of drug use or dealings.

Id. at 218.

In the present case, the two buys could have occurred as long as sixteen days prior to the execution of the search warrant. Nothing contained in the affidavit established or suggested that had cocaine been at the Montgomery premises, it would still be there. The minimal number of contacts over a relatively short time span did not suggest an ongoing drug enterprise. Nor was there an assertion anywhere in the affidavit that the cocaine actually came from the Montgomery address or that anyone saw cocaine inside the premises. Obviously, since no one stated he or she saw cocaine inside the premises, the amount or who actually possessed the cocaine was not discussed. Finally, since officers had not bothered to ascertain who lived at the premises prior to obtaining the search warrant, they had no information regarding prior drug use or dealings by the occupants.

Given the remoteness of the incidents discussed in the affidavit and the lack of information regarding items seen in the house or the occupants of the house, the affidavit failed to establish that, even if there had been cocaine in the house at one time, it would still be there when the search warrant was executed.

The "good faith" exception to the probable cause requirement under the fourth amendment which was created in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), reh'g denied, 468 U.S. 1250, 105 S.Ct. 52, 82 L.Ed.2d 942 (1984), and its companion case, Massachusetts v. Sheppard, 468 U.S. 981, 1045 Ct. 3424, 82 L.Ed.2d 737 (1984), does not permit the admission

of evidence seized from the Pyeatt home pursuant to the invalid warrant. The United States Supreme Court created the "good faith" exception to allow the admission of evidence seized pursuant to a search warrant which later proved to be defective where the "officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." Leon, 468 U.S. at 918. While in some circumstances it is objectively reasonable to believe that a search warrant is valid (see e.g. Massachusetts v. Sheppard, 468 U.S. at 989), the high court made it clear "that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." Id. at 922. The Court pointed out:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978).
>
> . . . . .
>
> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (Citations omitted.) Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient--i.e. in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot presume it to be valid.

Id. at 923.

In the present case, as set forth in subpoint B below, Droubay, the affiant officer, knew that certain information

contained in the affidavit was false and misled the issuing magistrate by the use of such information and by the omission of other material information. Under such circumstances, the good faith exception is inapplicable.

Furthermore, as set forth above, the affidavit on its face was so insufficient that an officer could not reasonably believe that probable cause to search the Montgomery house existed. The failure to particularize the items to be seized, instead giving a general description of cocaine and paraphernalia one might guess would be found, further suggests that an officer could not reasonably believe that the search warrant was valid.

Because the affidavit failed to establish a fair probability that cocaine had been inside the house at 533 Montgomery Avenue or that if it had been, it was still there, no probable cause existed for a search of the Montgomery house. The evidence obtained pursuant to the invalid warrant is not admissible under the Leon good faith exception, and the fruits of the unlawful search should therefore be suppressed.

B. MATERIAL REPRESENTATIONS AND OMISSIONS IN THE AFFIDAVIT INVALIDATED THE SEARCH WARRANT.

In Franks v. Delaware, 438 U.S. 154, 155-6, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the United States Supreme Court held that a defendant has the right to an evidentiary hearing where he or she makes a preliminary showing that a false statement was intentionally included in the affidavit or done so with a reckless disregard for the truth and such false statement was necessary for a

finding of probable cause. The court further determined that if the defendant establishes by a preponderance of the evidence at the hearing that the false statement was intentionally included by the affiant, or included with a reckless disregard for the truth, then the false material must be excised from the affidavit and the remaining information contained in the affidavit must be reviewed for a determination as to whether it supports a finding of probable cause. If probable cause does not exist without the excised material, the search warrant must be voided and the items seized under the warrant excluded.

In Franks, the affiant officer included statements in the affidavit attributed to two persons at the Youth Center where the defendant had been employed. Defense counsel requested the opportunity to call the affiant officer to testify as well as the two individuals at the Youth Center and proffered that the two individuals would testify that they had not made the statements to the affiant. Defense counsel further contended that the affiants included the misstatements in the affidavit in bad faith. Franks v. Delaware, 438 U.S. at 158. Under such circumstances, the Court held that a hearing to determine the veracity of the information was appropriate.

In State v. Slowe, 728 P.2d 110 (Utah 1985), reh'g denied (1986), the Utah Supreme Court, citing Franks v. Delaware, acknowledged that "[f]alse statements in a probable cause affidavit made knowingly, intentionally, or recklessly, can invalidate a warrant issued in reliance thereon [citation omitted]." Id. at

111. In Slowe, the police officer prepared the affidavit prior to a transaction which was part of a "sting" operation. The transaction occurred essentially as anticipated, and the statements in the affidavit were, for the most part, accurate. Although the Court did not condone the preparation of affidavits prior to the occurrence of events described therein, it found no error and determined that "[t]he minor discrepancies that did occur did not undermine the essential truth of the allegations or rise to the level of knowingly, intentionally or recklessly making a false statement." Id. at 111.

In State v. Nielsen, 727 P.2d 188 (Utah 1986), cert. denied, 107 S.Ct. 1565, decided shortly after Slowe, the Utah Supreme Court followed the fourth amendment analysis in Franks v. Delaware and extended the Franks analysis to include omissions as well as misrepresentations. The court pointed out that the affidavit must be examined to determine whether the affidavit would support a finding of probable cause if material misrepresentations were not included or if material omissions were added. In Nielsen, the officer swore in the affidavit that a confidential informant told him that a person living at Nielsen's address and driving a distinctive car had a large amount of cocaine in his possession. The officer attested to the C.I.'s reliability based on prior transactions with the C.I. At the preliminary hearing, the officer essentially reiterated the statements in the affidavit. Id. at 190.

After the preliminary hearing, the state revealed that the affiant did not know the C.I. and had not been informed of the

details in the affidavit. Instead, another police officer who worked with the C.I. had given the information to the affiant officer. Id.

The Court found the state's contention that the false statements were not made intentionally or with a reckless disregard for truth "entirely unpersuasive," pointing out:

> A law enforcement officer must be aware not only of the need for accuracy in the information provided to a magistrate in support of an application for a search warrant, but also of the importance of absolute truthfulness in any statements made under oath.

Id. at 191 (emphasis added).

Despite the intentional false statements made by the officer in the affidavit, the Nielsen court upheld the search warrant "under federal law" (Id. at 192) because the falsehood "was not material to the magistrate's finding of probable cause." Id. at 191. In reaching its decision, the Court relied on the "presumption that police officers will be truthful in their communications with each other, [and the rule that] double hearsay may support the issuance of a warrant. . .". Id. at 192.

In State v. Miller, 740 P.2d 1363 (Utah App. 1987), this Court followed the fourth amendment rule set forth in Franks v. Delaware and State v. Nielsen and determined that the alleged misstatements were not included intentionally or with a reckless disregard for the truth since they "were based upon reasonably reliable information such as official public documents" (Id. at 1366-7) and the defendant did not present evidence that the affiant

included the falsehood intentionally or with a reckless disregard for the truth. Id. at 1367.

The Utah Supreme Court has recognized that omissions of material information from an affidavit as well as material misrepresentations in the affidavit must be considered when determining whether the search warrant is valid. Where information is omitted from an affidavit, "the affidavit must be evaluated to determine if it will support a finding of probable cause when the omitted information is inserted (citations omitted)." State v. Nielsen, 727 P.2d at 191.

In People v. Kurland, 618 P.2d 213 (Cal. 1980), cert. denied, 451 U.S. 987 (1981), the California Supreme Court discussed the impact of the omission of facts from an affidavit and concluded that "the affiant's duty of disclosure extends only to 'material' or 'relevant' adverse facts (footnote omitted)." Id. at 218. The Court concluded that omitted facts are material "if their omission would make the affidavit substantially misleading." Id. The Court went on to say that facts are material if "there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." Id.

The Colorado Supreme Court pointed out in People v. Winden, 689 P.2d 578 (Colo. 1984) that:

> Omissions that are the product of an intentional effort to mislead the issuing magistrate or a reckless disregard of known material facts would normally justify more severe sanctions than errors occurring for other reasons.

Id. at 583. The rationale for more severe sanctions such as the

quashing of the warrant where information is intentionally omitted is that :

> When the police edit their information and withhold from the magistrate potentially adverse facts which they view as irrelevant or cumulative, then the police interfere with the magistrate's constitutional function. Although in such cases warrant applications may contain facts rather than conclusions, such affidavits are nonetheless conclusory in their selectivity. As a result, there is an increased risk that the privacy of the citizenry will be invaded on the basis of the police's as opposed to the court's assessment of relevance and reasonableness.

People v. Kurland, 618 P.2d at 226 (Bird, J., dissenting).

In the instant case, material misrepresentations were included in the affidavit and material information which might have altered the judge's probable cause determination was omitted from the affidavit. The most glaring misrepresentation occurred in the second paragraph of the facts listed in the affidavit.[2] In that paragraph, Deputy Droubay stated that within the past ten days, between February 24 and March 5, 1987,[3] he had used a confidential informant to execute two controlled buys of cocaine at 533 Montgomery Ave. (Addendum B at 2). At the hearing, Deputy Droubay acknowledged that this statement was false since the C.I. had never been inside the Montgomery address (T. 19,20).

---

[2] The first paragraph outlined Deputy Droubay's background and experience.

[3] The search warrant was signed on March 10, 1987, so this statement regarding timing of the buys was also inaccurate. Had the buys been made in the ten days prior to signing of the search warrant, they would have been made between March 1 and March 10, 1987. Judge McCleve apparently made no effort to clarify this discrepancy.

The misrepresentation in the instant case is more egregious than that which was included in the affidavit in State v. Nielsen. In Nielsen, the information from the C.I. was essentially correct; the misrepresentation involved which officer had received the information and could attest to the reliability of the C.I., but not the essence of the information upon which probable cause was found. In the case before the Court, the misrepresentation went to the heart of the probable cause finding and was included intentionally or, at the very least, with a reckless disregard for the truth.

As the Nielsen court emphasized, a law enforcement officer is aware of the need for accuracy and truthfulness in preparing an affidavit and such awareness should be taken into account when determining whether the officer had the requisite intent when he included the falsehood.

A police officer is also aware of the haste with which an affidavit is often reviewed. In Franks v. Delaware, the United States Supreme Court acknowledged that:

> The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Id. at 680.[4]

---

[4] In the Third Circuit Court in Salt Lake County, the judge generally signs search warrants during a brief recess in arraignments.

The location of the false information in the affidavit supports a determination that the affiant intentionally included the falsehoods. The first paragraph of the facts in the affidavit outline Deputy Droubay's background and experience. Therefore, the second paragraph containing the misrepresentation that two controlled buys occurred at the address to be searched was the first information concerning the basis for the search warrant to reach the magistrate.

The organization and substance of the remainder of the affidavit does little to dispel the incorrect impression initially given the magistrate and thus adds support to a finding that the Deputy intentionally misrepresented the facts to the magistrate. The third paragraph discusses preparing the C.I. to make a controlled buy and offers no information that this occurred at the Atherton address and not the place to be searched. The fourth, fifth and sixth paragraphs state that the C.I. entered the Atherton apartment and that someone then left the Atherton location and drove to the Montgomery address, then returned. A magistrate quickly scanning the affidavit might not pick up that two addresses were involved; even if she did, it is not clear that the person who left the Atherton apartment is someone other than the C.I. It is not until the second paragraph on page three of the affidavit that it becomes apparent the C.I. and Randy are different people. Given the complicated scenario, the lengthy fact statement, and the multiple persons and addresses involved, the officer should have known that the information in the first "substantive" paragraph would have an

overwhelming impact on the magistrate.

The numerous other misrepresentations and omissions of information from the affidavit show that Droubay was intentionally attempting to mislead the magistrate. As outlined in Point IA at 14, Droubay's statement regarding the timing of the two buys was inaccurate, and the incidents may have occurred as much as sixteen days prior to issuance of the search warrant.

In addition, Droubay stated that the C.I. told him that "as he entered the apartment, he was greeted by the suspect, known to us as RANDY. He handed the currency to RANDY, and RANDY then left the apartment for parts unknown to purchase the cocaine. (Addendum B at 3).

Despite somewhat confusing testimony as to who Randy was and whether he or someone else drove from the Atherton address to the Montgomery address, Droubay acknowledged that the person who officers followed from the Atherton address was not Randy:

> A: His first name was Brad. . . . He was identified by first name to us by the C.I. at the time of the first controlled buy. We knew who was going to be doing the driving; we knew who we had to follow.

T. 16.

The misinformation regarding whether Randy or Brad or someone else drove to the Montgomery address is significant when considered in conjunction with Droubay's assertion to Judge McCleve in the affidavit that the C.I. gave the money to Randy for a purchase and Randy then drove to the Montgomery address. If the C.I. actually gave the money to Randy and another person then drove

to the Montgomery house, the connection between the C.I., the "controlled buy" and the Montgomery address is much more attenuated than if the C.I. gave the money to someone who then drove to the Montgomery house.

In asking for a no-knock warrant that could be served at any time, Deputy Droubay also stated that:

> Independent surveillance also supports the fact that there is heavier traffic at night, and that the persons residing in the residence are usually away during the day.

Addendum B at 4. Deputy Droubay watched the Montgomery house on only three occasions. He kept no notes but testified that one of those occasions was during the day and two were in the evening (T. 66-67). During those visits, he saw three people enter and leave the house. Although he stated in the affidavit that the people who reside at the Montgomery house were "usually away during the day" (Addendum B at 4), he testified that he did not know who resided in the house and that during his single daytime visit, he saw children present (T. 59-60). The presence of children during the day suggests, contrary to the sworn statement of Deputy Droubay, that the occupants were present during the day. Furthermore, a single daytime surveillance is not sufficient to support the conclusion that the occupants were "usually" gone.

Finally, in asking that the search warrant be issued, Droubay reiterated that "your affiant has purchased cocaine, via the C.I. on two different occasions." Addendum B at 4. Although the Montgomery address is not stated, the implication is that the buys

occurred at that address. The sentence is located at a place within the affidavit where a magistrate quickly scanning the material would be apt to focus. The repetition of the incorrect information contained in the second paragraph further suggests Droubay had the requisite intent in including the false information.

Droubay also failed to include several pieces of material information in the affidavit. He did not inform the magistrate that during the half hour to hour that he and other detectives followed the person from the Atherton address, the C.I. was left unattended. Droubay's attempt to cover this lapse when testifying (T. 38-9), when read in conjunction with the testimony of the other officers that no officers remained at the Atherton address, further establishes that Droubay acted in bad faith and intentionally or with a reckless disregard for the truth in presenting false information to the magistrate.

Droubay also did not inform the magistrate that persons other than "Randy" resided at the Atherton address or that other people were in the Atherton apartment when the C.I. entered (T. 11-12, 13, 41). Nor did Deputy Droubay inform the magistrate that the C.I., who was left alone for a long period of time, was not an officer, that he had been arrested for Distribution of Controlled Substance, and that officers were dropping four additional counts of Distribution of Controlled Substance against the C.I. for his undercover work (T. 40).

The nature of the false information, its location in the affidavit, the organization of the affidavit, and the numerous

additional misstatements and omissions coupled with the glaring falseness of the statement and attempts to mislead the trial court judge with false testimony establish by a preponderance of the evidence that Droubay intentionally included the falsehoods or did so with a reckless disregard for the truth. These were not innocent mistakes but a deliberate attempt to mislead the magistrate. Based on the officer's testimony and a review of the affidavit, it is clear that the trial judge's finding that Deputy Droubay did not act in bad faith was erroneous.

Pursuant to the analysis set forth in State v. Nielsen and Franks v. Delaware, once the defendant establishes that an officer intentionally, or with reckless disregard for the truth, included a falsehood in the affidavit, under the fourth amendment, the falsehood must be excised and the remainder of the affidavit analyzed for a determination as to whether probable cause to support a search warrant existed. In addition, material omissions must be inserted when determining whether a search warrant should be upheld.

In determining whether probable cause existed for the issuance of a search warrant under the fourth amendment, the statements regarding controlled buys being made at the Montgomery address must be excised.[5]

---

[5] Because of the location of this paragraph, and the pervasiveness of this type of information, the taint of the misinformation is difficult to excise. A magistrate who read the second paragraph and reviewed the information that two controlled buys had occurred at the premises to be searched would have difficulty ferreting out the true facts from the complicated scenario outlined in the affidavit.

The information regarding the C.I. giving the money to Randy and Randy leaving must also be excised since the officer knew at the time he wrote the affidavit that this was incorrect. Similarly, the information regarding a phone call from Randy while at the Montgomery address must be excised because the officer knew at the time he drafted the affidavit that Randy was not at the Montgomery address.

In addition, information that the C.I. was left unattended for the half hour to hour during which the officers drove to and waited at the Montgomery residence must be inserted along with information that the C.I. had been arrested in the past for Distribution of Controlled Substance and the officers were dropping additional charges involving illegal drugs based on the C.I. working with them.[6]

An examination of the affidavit without the false information and including the omitted information reveals that probable cause for the warrant did not exist. As outlined in subpoint A, no one saw cocaine inside the Montgomery house and the cocaine the C.I. gave officers could have come from the car, the Atherton house, or other people inside the Atherton house. The information that the C.I. was left unattended for a significant period of time raises numerous other potential sources--the C.I. could have left the Atherton address to obtain cocaine or others,

---

[6] Some judges believe that an intentional material omission requires that the search warrant be quashed. See People v. Kurland, 618 P.2d at 226 (Bird, J., dissenting); People v. Winden, 689 P.2d 578 (Colo. 1984).

undetected by the absent officers, could have entered the apartment with cocaine.

The added information that the C.I. had allegedly participated in the sale of illegal drugs and stood to benefit by the dismissal of four counts of Distribution of Controlled Substances by helping officers impacts on the issue of the C.I.'s reliability. As previously outlined, the general statements in the affidavit regarding the C.I.'s credibility left some question as to whether information from the C.I. had ever resulted in a conviction. Although the affidavit does not assert that the C.I. said the cocaine came from Randy, the C.I.'s reliability is nevertheless of paramount importance in light of the significant amount of time he was left unattended during which he could have obtained cocaine from numerous sources.

In addition, the information regarding the phone call from "Randy" must be excised since the officer knew that Randy was not the person who left the house. Finally, had the magistrate known that officers had conducted surveillance of the Montgomery residence on only one occasion during the day and that the occupants, which included children, may well have been home at that time and the "heavier traffic" at night consisted of only three people, there is a substantial possibility her decision to issue the search warrant might have been different.

As outlined in Point IA, the affidavit was very weak on its face. Once the falsehoods are excised and material omissions inserted, it becomes apparent that the trial court erred in

upholding the search warrant, since probable cause to search the Montgomery residence did not exist. The evidence seized pursuant to the invalid search warrant should have been suppressed.

POINT II

THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE INVALID UNDER THE UTAH CONSTITUTION.

Article I, section 14 of the Utah Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

It is well established that Utah is free to analyze its state constitution differently from case law which is based on an interpretation of the federal constitution. See State v. Earl, 716 P.2d 803 (Utah 1986); State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988); State v. Hygh, 711 P.2d 264, 271-72 (Utah 1985) (Zimmerman, J., concurring).

This Court and the Utah Supreme Court have acknowledged that federal law under the fourth amendment has become "a labyrinth of rules built upon a series of contradictory and confusing rationalizations and distinctions" (Hygh, 711 P.2d at 271-2) and that in certain contexts, a distinct analysis under article I, section 14 of the Utah Constitution may be preferable to a fourth amendment analysis. Id., see also State v. Larocco, 742 P.2d 89, 95 n.7 (Utah App. 1987) (pet. cert. granted); Id. at 103-5 (Billings, J., concurring and dissenting).

In State v. Watts, 750 P.2d 1219 (Utah 1988), although the majority[7] asserted that the court had not interpreted article I, section 14 differently from the fourth amendment, it acknowledged that "choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this State's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts. (Citations omitted.)" Id. at 1221, n.8.

In his dissent in Watts,[8] Justice Zimmerman disagreed with the majority's statement that the Court has "'never drawn any distinctions' between article I, section 14 and the federal fourth amendment and has 'always considered the protections afforded to be one and the same.'" Id. at 1125. He pointed out:

> Several of our older cases may have language that supports this view, although none have pondered the question deeply, and some members of this Court may still agree with it, but I do not think this dictum expresses the views of all those joining in the Chief Justice's opinion, much less a majority of the Court. My view on this point finds support in footnote 8 of the majority opinion, which differs dramatically in tone from the text referred to above.

Id. at 1226.

In State v. Nielsen, 727 P.2d 188 (Utah 1986), the Court concluded that the falsehood contained in the affidavit was not

---

[7] The majority was comprised of Justices Hall and Howe and Judge Orme of this Court participating in the place of Justice Stewart.

[8] Justice Durham concurred in Justice Zimmerman's dissent.

material and upheld the search warrant under the Franks fourth amendment analysis. The Court pointed out, however, that the decision was not dispositive of how the issue might be resolved under article I, section 14 of the Utah Constitution. The Court acknowledged that "the federal law as it has developed since Franks v. Delaware is not entirely adequate" and that "[t]here is no stronger argument for developing adequate remedies for violation of the state and federal constitutional prohibitions on unreasonable searches and seizures than the example of a police officer deliberately lying under oath in order to obtain a search warrant." Id. at 192-3. Hence, an analysis under the Utah Constitution distinct from that in Franks v. Delaware is appropriate where misrepresentations are included in an affidavit in support of a search warrant or omitted therefrom.[9]

Prior to the decision of the United States Supreme Court in Franks v. Delaware, the Fifth Circuit Court of Appeals pointed out that "[i]f the affiant intentionally makes false statements to mislead a judicial officer on application for a warrant, these falsehoods render the warrant invalid regardless of whether or not such statements are material to establishing probable cause."

---

[9] In Franks, the defendant "conceded that if what is left is sufficient to sustain probable cause, the inaccuracies are irrelevant" and that if "the warrant affiant had no reason to believe the information was false, there was no violation of the Fourth Amendment." Franks v. Delaware, 438 U.S. at 172. Hence, the issue of whether an intentional or reckless misrepresentation in an affidavit invalidates the search warrant was not presented to the high court.

United States v. Hunt, 496 F.2d 888 (5th Cir. 1974); see also United States v. Thomas, 489 F.2d 664 (5th Cir. 1974).

The Alaska Supreme Court has deviated from the decision in Franks in interpreting its constitutional proscription against unreasonable search and seizure. See Moreau v. State, 588 P.2d 275 (Alaska 1978); State v. Malkin, 722 P.2d 943 (Alaska 1986). In State v. Malkin, the Court noted:

> If, in fact, the police officer affiant intentionally made the misstatements then the search warrant should be invalidated whether or not probable cause would remain from the affidavit after the misstatements were excised. A deliberate attempt to mislead a judicial officer in a sworn affidavit deserves the most severe deterrent sanction that the exclusionary rule can provide. Further, the fact that the officer has lied puts the credibility of the officer and of the entire affidavit into doubt. (Citations omitted.)

Id. at 946 n.6.

The Louisiana Supreme Court reached a similar conclusion that a warrant cannot "survive the intentional deception of a magistrate by an affiant" in State v. Caldwell, 384 So.2d 431 (La. 1980).

In People v. Cook, 583 P.2d 130 (Cal. 1978), the California Supreme Court also determined that where deliberate falsehoods are contained in an affidavit, the entire affidavit and search warrant must be quashed. The Court noted:

> Contrary to the case of negligent mistakes, excision of deliberate falsehoods in an affidavit does not leave the remaining allegations unaffected and hence presumptively true. The fact that the misstatements are intentional injects a new element into the analysis, to wit, the doctrine that a witness knowingly false in one part of his testimony is to be distrusted in the whole.

Id. at 140. The court summed up that "although the court can excise the intentionally false allegations it cannot presume the remainder to be true. Lacking a reliable factual basis in the affidavit, the court has no alternative under settled constitutional principles but to quash the warrant and exclude the product of search. [Citations omitted.]" Id. at 141.

The Court pointed out that elimination of intentional falsehoods is not enough since officers would have "everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy. [Citations omitted.]" Id.

The reasoning of the Alaska, Louisiana and California courts, among others, should be adopted when analyzing article I, section 14 of the Utah Constitution. Where an officer intentionally includes false information in an affidavit or includes such information with a reckless disregard for its truth, the entire affidavit should be invalidated. The fact that a significant misrepresentation was included in an affidavit, despite the officer's awareness of the necessity for accuracy (see State v. Nielsen, 727 P.2d at 191), raises a question as to the reliability and veracity of the information contained in the rest of the affidavit. Furthermore, officers who intentionally or recklessly include falsehoods in an affidavit should realize that negative repercussions will result from the use of such misrepresentations.

In the present case, where numerous misrepresentations, stretching of the facts and omissions occurred, the entire affidavit

becomes suspect. The overwhelming taint of the falsehood contained in the second paragraph permeates the entire affidavit. Rather than attempting to excise the many falsehoods and insert the omissions, this Court should adopt the more straightforward approach that article I, section 14 requires that an affidavit be invalidated where an officer intentionally or with a reckless disregard for the truth swears to a material misrepresentation.

As outlined in Point IB, the misrepresentations were included intentionally or, at the very least, with a reckless disregard for the truth and the omissions were left out with the intent to mislead the magistrate. Under article I, section 14, the search warrant in this case should be invalidated as a result of the intentional or reckless misrepresentations and omissions in the affidavit.

California courts have also held that where a misrepresentation is negligently included in an affidavit, the misrepresentation must be excised and the affidavit reviewed for a determination as to whether probable cause exists absent the false statement. See People v. Theodor, 501 P.2d 234 (Cal. 1972) (modified on denial of reh'g); People v. Cook, supra. Even if this Court determines that Droubay was merely negligent in including the false statements, it should nevertheless, under article I, section 14 of the Utah Constitution, excise the false statements and review the remainder of the affidavit. Even if the statements were included negligently, they were nevertheless false and not properly included.

The affidavit absent the false statements, as set forth in Point IB above, does not set forth sufficient facts for a finding of probable cause and the search warrant should therefore be quashed and the evidence seized pursuant to the warrant suppressed.

This Court should follow the lead of other state courts and interpret article I, section 14 of the Utah Constitution to require that where an officer affiant intentionally or recklessly includes material misstatements in and omits material information from an affidavit, the entire affidavit must be invalidated. In addition, this Court should interpret the State Constitution to require the excision of misstatements which are negligently included in an affidavit. Pursuant to either approach, the search warrant was invalid under the Utah Constitution and evidence seized pursuant to the invalid warrant should be suppressed.

Appellant respectfully requests that this Court reverse his conviction and remand the case for a new trial absent the illegally seized evidence, or, in the alternative, dismissal.

POINT III

THE SEARCH WARRANT VIOLATES STATUTORY AND CONSTITUTIONAL REQUIREMENTS FOR PARTICULARITY.

Both the fourth amendment of the federal constitution and article 1, section 14 of the Utah Constitution require that a search warrant describe with particularity the items to be seized. Utah Code Ann. §77-35-3(1) (1953 as amended) also requires that a search warrant particularly describe the evidence or property to be seized.

In Allen v. Holbrook, 135 P.2d 242, 249 (Utah 1943) modified on reh'g. and pet. denied, 139 P.2d 233 (Utah 1943), the Utah Supreme Court explained the particularity requirement:

> The goods to be seized must be described with such certainty as to identify them, and the description must be so particular that the officer charged with the execution of the warrant will be left with no discretion respecting the property to be taken (citations omitted).

Id. at 249.

In the instant case, both the search warrant and the affidavit list the items to be seized as "Cocaine, a white powdery substance, cutting agents, packaging and scales." The types of cutting agents, packaging and scales and the amount or consistency of cocaine are not specified. Such a general description of the items to be seized violates the particularity requirement of both constitutions as well as the statutory requirement, and the items seized pursuant to the search warrant should therefore be suppressed.

CONCLUSION

Appellant respectfully requests that this Court reverse his conviction and remand this case for a new trial without the illegally seized evidence or, in the alternative, dismissal.

Respectfully submitted this 10 day of November, 1988.

BROOKE C. WELLS
Attorney for Defendant/Appellant

JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 230 South 500 East, Suite 300, Salt Lake City, Utah 84112 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 16 day of November, 1988.

Joan C. Watt
JOAN C. WATT

DELIVERED by _____

this _____ day of November, 1988.

_____

ADDENDUM A

DAVID E. YOCOM
County Attorney
By: HOWARD R. LEMCKE
Deputy County Attorney
Courtside Office Building
231 East 400 South, 3rd Floor
Salt Lake City, Utah 84111
Phone: (801) 363-7900

IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. 0737

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah.

Proof by Affidavit under oath having been made this day before me by C. Mike Droubay - Salt Lake County Sheriff's Office, Narcotics Division, I am satisfied that there is probable cause to believe

That (X) on the premises known as 533 South Montgomery, 1575 West, the east side of a red brick duplex, with white trim and a red front porch with black rod iron railing.

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

Cocaine, a white powdery substance, cutting agents, packaging and scales.

and that said property or evidence:

(X) was unlawfully acquired or is unlawfully possessed; or
(X) has been used to commit or conceal a public offense; or
(X) is being possessed with the purpose to use it as a means of committing or concealing a public offense; or
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct;

Affiant believes the property and evidence described above is evidence of the crime(s) of UNLAWFUL DISTRIBUTION OF A CONTROLLED SUBSTANCE FOR VALUE and UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE IT FOR VALUE

You are therefore commanded:

(X) at any time day or night (good cause having been shown)
(X) to execute without notice of authority or purpose, (proof under oath being shown that the object of this search may be quickly destroyed or disposed of or that harm may result to any person if notice were given)

to make a search of the above-named or described premises for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Fifth Circuit Court, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this 6 day of March, 1987.

JUDGE OF THE FIFTH CIRCUIT COURT

ADDENDUM B

DAVID E. YOCOM
County Attorney
By: HOWARD R. LEMCKE
Deputy County Attorney
Courtside Office Building
231 East 400 South, 3rd Floor
Salt Lake City, Utah 84111
Phone: (801) 363-7900

IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH)
): ss
County of Salt Lake)

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: SHEILA MCCLEVE — JUDGE
450 SOUTH 200 EAST — ADDRESS

The undersigned affiant being first duly sworn, deposes and says:

That he has reason to believe

That (X) on the premises known as 533 South Montgomery, 1575 West, the east side of a red brick duplex, with white trim and a red front porch with black rod iron railing.

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

Cocaine, a white powdery substance, cutting agents, packaging and scales.

and that said property or evidence:

(X) was unlawfully acquired or is unlawfully possessed; or
(X) has been used to commit or conceal a public offense; or
(X) is being possessed with the purpose to use it as a means of committing or concealing a public offense; or
(X) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct;

Affiant believes the property and evidence described above is evidence of the crime(s) of UNLAWFUL DISTRIBUTION OF A CONTROLLED SUBSTANCE FOR VALUE and UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DISTRIBUTE IT FOR VALUE.

The facts to establish the grounds for issuance of a Search Warrant are:

Your affiant is a Salt Lake County Deputy Sheriff with two and a half years of law enforcement experience. Your affiant is presently assigned to the Narcotics Division. Your affiant has been trained by P.O.S.T., Utah Police Academy, in the identification of narcotics. Your affiant has also received continued education and training regarding narcotic dealings through experienced police officers and on the job experience.

Within the past ten days, between the period of February 24th and March 5th, 1987, your affiant has executed two controlled buys of cocaine, using a confidential informant. Hereafter, referred to as C.I. to obtain cocaine at 533 South Montgomery, the east duplex, Salt Lake City, Salt Lake County, Utah.

On the first occasion, the C.I. met with your affiant, and assisting Detectives, where the C.I. was searched. The C.I. had no money, nor controlled substances, on his person. The C.I. was given $275.00, consisting of two $100.00 bills, three $20.00 bills, one $10.00 bill, and one $5.00 bill, and given instructions to purchase 3.5 grams of cocaine, known as an "eight ball".

At that point, the C.I. left your affiant's vehicle and walked directly to 4545 Atherton, in the Lexia Haven Apartment Complex, building #7, Apartment 144. He was observed by your affiant to enter that apartment building. He did not make any stops, divert his paths, or make contacts with anyone, up to that point.

Approximately two minutes later, a male white, approximately 5'9", 150 pounds, blonde, curly hair, known as RANDY, was observed by your affiant leaving the apartment, went to the parking lot, and got into a 1982 Datsun, red in color, Utah listing: MVT 214. This suspect was then followed by the Narcotics Squad to 533 South Montgomery. He made no stops, nor did he divert his path, prior to arriving at the Montgomery address. The suspect parked his car in front of the Montgomery address, and was observed by myself and Deputy Herlin, to enter the east door of the red brick duplex at that time. The suspect stayed there for approximately twenty-two minutes, and then was observed by Deputy Judd leaving the same door of the residence, getting back into his vehicle, and then again proceeded south bound on Interstate 15.

He was followed by myself and the Narcotics Squad, directly back to 4545 Atherton, Apartment #144. He made no stops, nor did he divert his path this time either. The suspect arrived back at the apartment in approximately fifteen minutes, walked directly from his car back into the apartment, where approximately five minutes later, the C.I. was observed to exit the apartment, and walk directly back to your affiant's vehicle.

The C.I. was re-searched at that time, finding no U.S. Currency, or controlled substances on him, besides a small paper bindle, inside a plastic bag, which contained a white powdery substance. The package, containing the white powdery substance, was field tested by your affiant. A portion of which resulted in a positive indication for cocaine.

C.I. stated that at the time affiant was aware that RANDY was at the Montgomery address, C.I. received, at the Atherton address, a phone call from RANDY saying the "stuff" is on a scale and that RANDY would be back.

Your affiant received information, at that time, from the C.I. as he entered the apartment, he was greeted by the suspect, known to us as RANDY. He handed the currency to RANDY, and RANDY then left the apartment for parts unknown to purchase the cocaine.

On the second occasion, the C.I. met with your affiant and assisting detectives, where the C.I. was searched again, finding no U. S. currency or controlled substances on him. At that point, he was given $220.00 in U. S. currency, consisting of two $100.00 bills, and one $20.00 bill. The C.I. was given instructions at that time to purchase two grams of cocaine. The C.I. got back into his vehicle, which had also been searched by your affiant, drove directly to 4545 Atherton, Apartment #144. He did not divert his path, nor make contact with anybody. He then left his vehicle and walk directly to apartment #144, and was given entrance.

Approximately three minutes later, the same suspect, known as RANDY, exited the apartment and walked directly to the 1979 Mercury Monarc, with Utah listing: 161 AMW. He got into the vehicle and proceeded out of the apartment complex, east on 45th South, and north on Interstate 15, followed by the entire Narcotics Squad.

The suspect remained northbound on Interstate 15 to the Redwood Road exit, took the Redwood Road exit to 5th South, went from 5th South, directly to 533 South Montgomery, where he was observed by Deputy Rigby to walk directly to 533 Montgomery and enter. This being sixteen minutes, from the time he left the Atherton address.

The suspect stayed inside the residence for approximately eight minutes, and then was observed by Deputy Rigby to exit the residence, walk directly to his car, and proceeded to 5th South, then to Redwood Road, then back to Interstate 15 southbound.

At this point, the suspect drove directly back to 4545 Atherton, #144, without diverting his path, or making contact with anybody. He was observed by Deputy Rigby to park the car in the parking lot, and walk directly to #144 and enter.

One minute later, your affiant observed the C.I. exit the residence, walk directly to his vehicle, and drive to a pre-arranged point, without diverting his path, or making contact with anyone. He was re-searched approximately four minutes, as was his vehicle, finding no controlled substances, other than a small paper bindle, containing a white powdery substance, which he was instructed to order from the suspect known as RANDY.

The package that contained the white powdery substance, a portion of which was tested by your affiant. It resulted in a positive indication for cocaine.

Your affiant considers the information received from the confidential informant reliable because (if any information is obtained from an unnamed source)

Your affiant and assisting Detectives, have had the C.I. purchase cocaine on at least eight separate occasions, and each representation made was born out by producing either cocaine or marijuana. The C.I. has also purchased marijuana and cocaine on several occasions for your affiant and assisting Detectives.

Your affiant has verified the above information from the confidential informant to be correct and accurate through the following independent investigation:

Your affiant has used information given to him by the C.I. to make arrests of your narcotic dealers, said to obtain other search warrants. The previous search warrants obtained by your affiant and other Narcotic Detectives using information, and controlled buys from the C.I. have all been confirmed by producing controlled substances, as a result of the authorized searches, including narcotics packaging, and resulting in arrests of persons for violation on those premises.

WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of said items:

(X) at any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered, or for other good reasons, to-wit:

Your affiant has purchased cocaine, via the C.I. on two different occasions. Independant surveillance also supports the fact that there is heavier traffic at night, and that the persons residing in the residence are usually away during the day.

It is further requested that (if appropriate) the officer executing the requested warrant not be required to give notice of the officer's authority or purpose because:

(X) the property sought may be quickly destroyed, disposed of, or secreted.

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 10th day of March, 1987.

JUDGE IN THE FIFTH CIRCUIT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ADDENDUM C

defense that this taking of evidence from the Montgomery Street address was in violation of Mr. Pyeatt's State and Federal Constitutional rights. Thank you.

THE COURT: The Court reviewed both memorandums, both memoranda in this case. I did take fairly complete notes on the matter. I've reviewed that. I have a reasonably accurate memory. And the Court observes in making a probable cause determination ruling, we are dealing with probabilities, not certitudes.

Given the fact that the Court has to allow some credence to the conduct of the issuing magistrate -- the Court must assume that Judge McCleve deals in preliminary hearings on a regular basis, that she issues warrants on a regular basis and she's engaged in that business with greater intensity and familiarity than is this Court, so the Court must assume that she has perhaps a greater level of familiarity with these things than the reviewing Court.

The Court in these cases gets these motions to suppress, and it is not the most frequent thing. But the Court observes a consistent pattern in these kinds of actions. And your affidavit does state

that there were eight transactions, as I recall, with the confidential informant. Prior to these transactions, we have two controlled buys before the warrant issued in this case. And although there are some inaccuracies, there's nothing in the testimony of Officer Drewbay, there's nothing in the affidavit, that suggests any bad faith on the part of the officers involved in this case.

The pattern of going to one location, the strip search, giving the CI money and having him make contact, transfer the money and then go to another place to get the drugs is a pattern that the Court has observed in every case it's been involved in. And from that, I think the officers can see a common pattern from which they can draw reasonable inferences.

And given all of those circumstances, I think there's sufficient -- reviewing the affidavit and considering the totality of the circumstances, the Court finds that there's nothing insufficient about the affidavit sufficient to vitiate the probable cause determination made by Judge McCleve, therefore denies the motion to suppress.

MS. WELLS: Your Honor, as the Court is aware, that is the case. I mean, what I had suggested